Office-Supreme Court, U.S.
FILED
JAN 7 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-449

In the Supreme Court of the United States

OCTOBER TERM, 1984

ROGER SWIFT,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

REPLY BRIEF OF PETITIONER

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January 3, 1985

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QUESTION PRESENTED FOR REVIEW

WHETHER THE CIRCUIT COURT ERRED IN HOLDING THAT CONVICTION FOR EXTORTION UNDER COLOR OF OFFICIAL RIGHT UNDER THE HOBBS ACT, 18 U.S.C. §1951(b)(2), DOES NOT REQUIRE ANY PROOF THAT THE DEFENDANT PUBLIC OFFICIAL INDUCED OR SOLICITED THE PAYMENT.

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STATEMENT OF THE CASE

Not content with our acknowledgement that there was sufficient evidence at trial to support a conclusion that Swift obtained the money in question by demanding it in return for governmental favors (petition at 7), the United States chooses to summarize that evidence at great length

(brief at 2), as if it were unchallenged fact. But as we emphasized, that summary is irrelevant to the point at issue, which is that the trial court's instructions permitted the jury to convict Swift of extortion despite an unwillingness to believe *any* of the evidence offered by the prosecution.[1]

What the United States overlooks is the substantial evidence summarized in our petition (pp. 6-7), which permitted the jury to conclude that Swift had named an amount of money, and had taken that money, only because he was repeatedly solicited and exhorted by CFW to do so. As we noted, Swift proved that CFW was in difficulty with the federal government, and that some of its highest officials had entered into plea agreements under which they promised to cooperate fully with any governmental investigation of the utility construction industry (*see* Tr. 75, 80-83, 87, 170-72, 177). Swift testified that it was McBee who first raised the question of money—as a part of CFW's attempt to curry favor with the government in light of its troubles—and who consistently exhorted him to take it (Tr. 414-18, 430). Swift attributed to McBee the representation that McBee would be leaving CFW in the future, and that CFW would give him a better recommendation if he went along with this attempted bribery (Tr. 416). Indeed, one of the tape-recorded conversations revealed McBee's representation that Swift's acceptance of the money would "mean a difference of me getting a job somewhere else" (Tr. 510).

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1. As the court noted in *United States v. O'Grady*, 742 F.2d 682, 692-93 (2nd Cir. 1984) (en banc): "This is not to say that O'Grady could not have been found guilty on the facts of this case if the jury had been properly charged. . . . A new trial is necessary because the charge to the jury omitted an essential element of the offense, *to wit*, a finding that O'Grady misused his office to obtain benefits not due him or his office."

As we noted (petition at 9), the jury's questions strongly suggest that it believed Swift's version of what had happened. The jury asked it it were necessary for Swift to make the first approach in order to be guilty of extortion—a question which would have been irrelevant unless it believed that McBee had first approached Swift. The jury asked if Swift would still be guilty of extortion if McBee had offered him money and Swift had simply accepted it—an unmistakable signal that it believed Swift's story. The jury asked the difference between bribery and extortion, disclosing a clear belief in Swift's testimony that he had simply taken a bribe (A. 4). And later, the jury asked if it was extortion if McBee or CFW had offered Swift some money, and Swift had simply "stated a dollar amount" and then took the money (A. 4)—another unmistakable indication that it believed Swift's testimony.

Whether or not the jury's questions disclose a belief in Swift's testimony, however, the important point is that Swift's evidence *permitted* such a belief, and that the trial court's late instruction required conviction *despite* such a belief. As we emphasized, it told the jury, in response to the fourth question, that Swift would be guilty of extortion for merely *stating* a dollar amount in response to McBee's offer of money—thus permitting his conviction despite the jury's belief that he had done so not in any affirmative misuse of his office, but only in response to repeated exhortation. We contend that *O'Grady* forbids that result, thus creating an explicit inter-circuit conflict.

ARGUMENT

The government's entire argument is an attempt to knock down a straw man, because it assumes that the basis for Swift's petition is the trial court's altered answer to the jury's second question, rather than its erroneous and prejudicial answer to the fourth question, which constitutes reversible error.[2] The second question asked whether it was necessary for Swift to make the first approach in order to be guilty of extortion; the trial court first answered "yes" and later answered "no" (A. 4-5). Isolating that instruction as the basis for Swift's petition, the government devotes the entirety of its brief to a demonstration that even under *O'Grady*, extortion may be shown by the defendant's exhortations, even if the complaining witness first raised the subject. We might quibble with that conclusion,[3] but that is unnecessary.

The basis for our petition is the trial court's response to the fourth question—completely ignored in the government's brief—to the effect that Swift would be guilty of extortion for doing nothing more than *stating* a dollar amount in response to an offer from the complaining witness—and by implication (in light of Swift's testimony), even in response to repeated entreaties that he take some money.

In its extended and irrelevant effort to discover in *O'Grady* nothing which requires that a public official initiate the discussion of payments, the government fails

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2. Even the government's statement of the Question Presented makes this mistake.

3. As the court noted in *O'Grady*, 742 F.2d at 691: "Thus extortion under color of official right begins with the public official, not with the gratuitous actions of another."

even to attempt a demonstration that *O'Grady* would permit conviction for extortion solely on the basis of evidence that the complaining witness had offered some money and the defendant had named the dollar amount. As we argued (petition at 10-12), the *O'Grady* holding is flatly inconsistent with the trial court's instruction to that effect. As *O'Grady* holds, "the government must show that the power of public office was misused in such a way as to *induce* the giving of benefits," 742 F.2d at 689 (our emphasis). That statement alone is flatly inconsistent with the trial court's instruction that Swift would be guilty of extortion for simply naming a dollar amount in response to an offer of payment—and this requirement is the heart of the *O'Grady* decision.

O'Grady requires proof "that the public official did something, under color of his public office, to cause the giving of benefits." *Id.* at 687. It finds in the extortion statute something more than "an affirmative obligation not to accept benefits of any type or form." *Id.* It disapproves the district court's instruction because it permitted conviction "absent any proof that [the defendant] wrongfully used his office to *induce* the benefits he received"—because it "equated the mere acceptance of benefits by a public official with wrongful use of public office . . . ." *Id.* at 688. It acknowledges that the "fact of public office supplies the potential threat or force necessary," but insists that "it is the wrongful use of that office to induce benefits that constitutes the crime." *Id.* As we have noted, it holds that "extortion under color of official right begins with the public official, not with the gratuitous actions of another." *Id.* at 691. Acknowledging that "inducement can take many forms," it nonetheless requires "[p]roof of a request, demand or solicitation, no matter how subtle . . . ." *Id.* at 691. At the least, the prosecution

must show that the defendant "created the impression, not by words but by deeds," that his victims "were expected to make generous 'gifts' . . . ." *Id.* at 692. It forbids conviction for extortion "unless the jury charge makes clear that this offense requires the jury to find that the public official did something, under color of his office, to cause the giving of benefits." *Id.* at 693.

These repeated pronouncements are flatly inconsistent with the trial court's instruction that Swift would be guilty of extortion if he simply named a dollar amount in response to an offer—and by implication, given Swift's evidence, that he would be guilty for naming a dollar amount even as the product of repeated and unrelenting exhortation by McBee. Taken in the light most favorable to Swift, that evidence cannot be reconciled with *O'Grady's* holding that the defendant must be shown to have "created the impression" that his victims "were expected to make generous 'gifts' "—and that the government must show "a request, demand or solicitation, no matter how subtle." To the contrary, the late charge permitted conviction in the absence of any evidence that Swift had affirmatively induced payment in any way.

This instruction could not have been given in the Second Circuit after *O'Grady*, notwithstanding the government's decision to seek no review of *O'Grady* in this Court. The conflict between the circuits is manifest, and it should be resolved. This is the perfect case for such resolution—the first case (to our knowledge) after *O'Grady* which presents the conflict squarely. The federal courts of this nation are presently instructing juries under two unmistakably different and irreconcilable interpretations of the Hobbs Act's prohibition against extortion—thus permitting convictions in some circuits which would not be permitted

in others. It is respectfully submitted that this conflict must be resolved.[4]

CONCLUSION

It is respectfully urged that a writ of certiorari should issue to review the judgment and decision of the United States Court of Appeals for the Eleventh Circuit in this case.

Respectfully submitted,

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4. In our initial petition (p. 12 n.5), we also raised two additional points in support of reversal. First is that the government clearly obligated itself by its indictment to prove some form of exhortation or inducement (A. 12-13), and the trial court's belated instructions constituted either a constructive amendment to, or a fatal variance from, the indictment. The government answers that this is nothing more than a restatement of the position taken in the petition, but there is a difference. Even if this Court were to disapprove the *O'Grady* decision, and thus uphold the trial court's instructions in this case, Swift's conviction nonetheless would have to be reversed in light of the variance. Having obligated itself to prove inducement, the government was required to do so.

Second, we argued that the late instructions erroneously imposed upon Swift the burden of proving his entrapment defense, because they informed the jury without qualification that Swift would be guilty of extortion for simply stating a dollar amount in response to McBee's offer—without qualifying that statement to emphasize that Swift would remain not guilty of the offense unless and until the government proved predisposition in the face of his entrapment defense. The government responds by citing both an earlier and a later charge about the government's burden of proving predisposition, ignoring the point.